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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

PAUL A. ACQUISTO, Petitioner

v

LEE COUNTY BOARD OF PUBLIC INSTRUCTION
(SCHOOL BOARD OF LEE COUNTY) et al.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Paul A. Acquisto
2455 Aldridge Avenue
Fort Myers, Florida 33907

QUESTIONS PRESENTED

WHETHER THE SCHOOL AUTHORITIES, OVER YEARS, DID CONSPIRE TO DEPRIVE AND TO CONCEAL BLACK TEACHERS' PREFERENCE FROM THE PUBLIC AND TO CONSPIRE TO HINDER AND OBSTRUCT JUSTICE BY CONCEALMENT AND MISREPRESENTATION OF THE TRUE FACTS TO THE COURTS IN NATIONAL EDUCATION ASSOCIATION (NEA) v. LEE COUNTY BOARD OF PUBLIC INSTRUCTION, 260 So.2d 206, 467 F.2d 447; AND DID BREACH THE CONTRACT AND DID CIRCUMVENT STATE LAWS TO BESTOW SAID RACIAL PREFERENCE AND DID INFACT VIOLATE RIGHTS PROTECTED BY THE AMENDMENTS INVOKED AND TO DETERMINE WHETHER THE COURT HAS DISCRETIONARY AUTHORITY TO UPHOLD SAID JUDGMENTS IN LIGHT OF THE DISCOVERY AND WHETHER STATE STATUTE OF LIMITATIONS IS APPLICABLE AND IS APPROPRIATE.

IN THE SUPREME COURT OF THE UNITED STATES

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PAUL A. ACQUISTO, Petitioner

v.

LEE COUNTY BOARD OF PUBLIC INSTRUCTION, (SCHOOL BOARD OF LEE COUNTY), SUPERINTENDENT OF THE LEE COUNTY PUBLIC SCHOOLS, RAYMA C. PAGE, HOWARD DE VORE, JOSEPH ISLEY, J. WILLIAM MILLS, ROBERT L. RATLIFF III, individually and as members of the Lee County Board of Public Instruction, and RAY V. POTTORF, individually and as Superintendent of the Lee County School system.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Paul A. Acquisto
2455 Aldridge Avenue
Fort Myers, Florida
33907

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:
Paul A. Acquisto, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on December 3, 1980.

OPINIONS BELOW

The judgment of the Court of Appeals is unreported and is printed in Appendix A hereto, infra, page 28. The judgment of the Supreme Court of Florida is reported as National Education Association v. Lee County Board of Public Instruction, 260 So.2d 206, and is printed in

Appendix A hereto, infra, page 1. The judgment of the Court of Appeals is reported as National Education Association v. Lee County Board of Public Instruction, 467 F.2d 447, and is printed in Appendix A hereto, infra, page 13. The opinion of the District Court for the Middle District of Florida is printed in Appendix A hereto, infra, page 23.

JURISDICTION

The judgment of the Court of Appeals was entered December 3, 1980. A timely petition for rehearing was denied on January 8, 1981 (Appendix D, infra, page 41). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether the school authorities, over years, did conspire to deprive and to conceal black teachers' preference from the public and to conspire to hinder and obstruct justice by concealment and misrepresentation of the true facts to the courts in National Education Association (NEA) v. Lee County Board of Public Instruction, 260 So.2d 206, 467 F.2d 447; and did breached the contract and did circumvent state laws to bestow said racial preference and did infact violate rights protected by the Amendments invoked and determine whether the court has discretionary authority to uphold said judgments in light of the discovery and whether state statute of limitations is applicable and is appropriate.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the Fifth Amendment and the first section of the Fourteenth Amendment to the Constitution of the United States; 28 U.S.C., Federal Rules of Civil Procedure, Rule 60(b); 42 U.S.C. sections 1981, 1983, 1985(2)(3); Florida Statute 230.22(5), 231.36(1)(2)(3)(a), 95.11(1)(2)(3)(4)(7)(b); the text of which are set forth in Appendix B, pp. 29-36.

STATEMENT OF CASE

This case directly attacked the validity of the prior judgments, National Education Association (NEA) v. Lee County Board of Public Instruction, 260 So.2d 206, 467 F.2d 447 (Appendix A, pp. 1-22), and the inequalities and inconsistency under state statute, F.S. 230 & 231; the racial discrimination and conspiracies to hinder and obstruct justice and to deprive equal protection of the law, pursuant to the provisions of 28 U.S.C. sections 1331 & 1343; 42 U.S.C. sections 1981, 1983, 1985(2)(3) and the Fifth and Fourteenth Amendments of the Constitution of the United States.

BACKGROUND

A dispute grew out of the state-wide public school crisis when teachers dissatisified with state legislative and executive actions pertaining to appropriations submitted resignations. The School Board voted to accept all resig-

nations. After legislative action to appropriations, the state teachers organization notified the teachers to return to their classrooms provided there were no reprisals and no reduction in status. The School Board considered themselves bound by state law not to reinstate the teacher but to allow the teacher to return as a new teacher. This was unacceptable to the teachers. Finally, under the auspices of private citizens, an agreement was achieved whereby the School Board would receive a $100 fine.

THE EVIDENCE

The School Board incorporated the agreement into the individual teacher's contract and ordered the $100 fine be paid in ten days. (School Board Minutes, Book 13, pages 543 & 556)

The School Board terminated the petitioner's contract for failing to comply with the terms. (Plaintiff's Exhibit 15, Appendix C, page 40) Five black teachers who "made" payment with checks, that were worthless and dishonored several times, were bestowed with what the school authorities now call preference. (Defendents' Affidavit, Appendix C, page 39)

Contrary to the terms of the contract and state laws, these black teachers were reinstated with all benefits and status held prior to their resignations. (This racial preference preceded any litigation.)

An action was instituted in the United States District Court for the Middle District of Florida by the petitioner and eight other teachers, representing a class of approximately 400 teachers, to

recover $100 payments labled as fines and to reinstate those teachers who did not pay the fine. (Since only black teachers who did not pay their fine received preference, none were in this class.)

THE RULINGS BELOW

That prior District Court in its opinion and subsequent order, NEA, 299 F.Supp. 834, held that although the defendants argued that the $100 payment were made by the teachers as a part of a bargain to obtain their old status, when legally all they were entitled to was the status as new teachers and that even if the $100 payment were fines, the authority delegated to the School Board by F.S.A. § 230.22(1) and (2) permits the imposition of these fines; the fines were imposed without legislative authorization and the School Board, a governmental authority, is bound, even in a crisis, by the Constitution. That court granted the plaintiffs' motion for a summary judgment and ordered the $100 returned and the reinstatement of those teachers named in the suit.

The defendants filed an appeal in the United States Court of Appeals for the Fifth Circuit requesting the matters of state law be certified to the Florida Supreme Court. The court granted this request. (NEA, 448 F.2d 451).

The Florida Supreme Court, NEA, 260 So.2d 206, Appendix A, page 1, held that there was no existing legal method by which the School Board could reemploy the departed teachers (A 3) without the

payment since the teachers action invoked the School Board's constitutional duty, Art.XII Section 9 and 13, (A 4) to recover monetary loss occasioned by the walkout. The court held that the only existing method is found in the agreement which was indeed a binding contract and it afforded the School Board to comply with state statutes and obtained status for the teachers for a nominal $100. The court held that all teachers equally bound (A 10) to make payment for reinstatement in compliance to state laws. Thus the court certified in the affirmative that no state laws were violated and the defendants' allegation are correct.

The prior Appeals Court, NEA, 467 F.2 d 447, Appendix A, page 13, held that one "property right" was surrendered to acquire another "property right"- namely $100 payment in return for reinstatement with status. "Likewise we may concede that the teachers here were involuntarily subjected to choosing between paying consideration for an employment benefit of at least equivalent value and foregoing employment altogether." (A 20) That court held that the contractual conditions did not deny the teachers any federal constitutional rights or impede them in any way. Upon the stated "facts" the court upheld the Florida Supreme Court's obligatory ruling and held that the school authorities exercised reasonable judgment. Since the court found no denial of a federal right, the court reversed and remanded in favor of the Lee County Board of Public Instruction. (Note: The above said courts ruled upon the stated "facts" - the racial prefer-

ence being concealed from the courts.)

This District Court ruled, Appendix A, page 23, that the constitutional issues were properly dealt with in NEA, supra, and thus the Fifth and Fourteenth Amendments to the United States Constitution are not applicable. The court declined to rule on the attack on NEA, Amended Complaint (Appendix C, pp.38-39), holding instead to the opinion that no event tolled the running of the state statute of limitation. The violation, if it occured, so said the court, accrued on or before the date plaintiff learned the black teachers were retained despite their failure to make the $100 payment. The judgment dealt primarily with the necessity of borrowing a state statue of limitation. The court relied solely on Cutliff v. Greyhound Lines, Inc., 558 F. 2d 803 (CA Fla. 1977) and Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (CA Tex. 1974) that held 42 U.S.C. section 1981 should be governed by F.S. 95.11(7)(b). Moreover, the court held all the issues and all the statutes invoked are governed by F.S. 95.11(7)(b) or its successor. The court also held that no breach of contract is alleged and although the effects of the alleged discrimination persist, it is not a continuing violation. Defendants' motion to dismiss was granted since the defendants rights outweighed the plaintiff's claims whenever they accrued.

This Appeals Court concurred (Appendix A, page 28) with the lower court and affirmed. The court expressed no disagreement with the finding regarding NEA, and that cases invoking 42 U.S.C. §§ 1981, 1983, 1985 are govern by F.S. 95.11(7)(b)

(or its successor), determined "in toto" by federal courts' classification.

REASONS FOR GRANTING WRIT

I

Certiorari Should Be Granted To Resolve Conflicts In Principle Among The Courts

The attack by litigation on the NEA, judgments as being null and void is proper according to the Federal Rules of Civil Procedure, Rule 60(b), 28 U.S.C. and the party need show no meritorious claims or defense or other equities in his behalf; the petitioner is entitled to have the judgments treated for what they are, a legal nullity.

The misrepresentations (Excerpts, Appendix C, pp. 37-38) incorporated into those judgments invalidates those judgments because they are, per se, repudiations of the true facts. Therefore, the petitioner should not be held to those judgments and is entitled to relief as a matter of law. See, 7 Moores Federal Practice, Section 60.25 (2)(3)(4).

In Sagers v. Yellow Freight Systems, 68 FRD 686, 689, that court held that under Rule 60(b)(4) no question of discretion exist with respect to a void decree and the time limitation does not apply.

In New York State Health Facilities Assoc. Inc. v. Carey, (1977) 76 FRD 128, 132 that court held Rule 60(b) places no time limit on an attack upon a void judgment. Carr v. District of Columbia,(1976) 543 F.2d 917, 927, asserts that if the party shows evidence was not discovered at the time of the judgment then the

judgment of which he complains is not immune to revision. In re Casco Chemical Co., (1964) 335 F.2d 645 at 652, the Fifth Circuit held, "We have clearly held that when the 60(b) relief is sought by independent action, there is no time limit ..." See, also, 3 Barron & Holtzoff section 1331 at 430 et seq. (Wright Ed. 1958).

An independent action in equity to enjoin its enforcement by attack wherein the validity of the judgment was appropriately put in issue is proper (A 38-39). 7 J Moore Federal Practice, section 60.25(3) pp. 311-312.

Even if the court held that the attack must relie on state law principles rather than federal rule, it would find that NEA judgments would be void and relief granted to the petitioner.

Section 438, 19 Fla. Jur., Judgments & Decrees, "The rule allowing the maintenance of a suit in equity for extrinsic fraud is not confined solely to overt acts or representations, concealment of material facts may amount ta a fraud warranting equitable relief." See, also, Sections 435 & 437. The state court cases cited therein uphold these sections and the federal courts applying state law should enforce those sections.

Even if the court held that it was required to borrow a state statute of limitation, it should select the most analogous statute which would be either F.S. 95.11 (1) an action upon a judgment of a court of record or F.S. 95.11 (2) an action upon a judgment of a court in the United States and not F.S. 95 (7)(b) an action for back pay. (Appendix B, page 33) F.S. 95.11 (4) (or its successor) for

any action for relief not specifically provided for in the chapter would be better suited than one addressing the issues as back pay.

A right of action is remedial, while the cause of action is substantive, and even if the action were consided as an amendment of the former it does not affect the substance of the latter. The relief relates back to cause of action in NEA as being prior claims since it does not substantially change the cause of action and even may be made after the statute of limitation has run. See, Griffin v. Workman, (Fla. 1954) 73 So.2d 844, 847; Smith & Sons, Inc., (Fla. 1975) 318 So.2d 184. Therefore the petitioner holds that the prior action outweighs the right to bar.

"Similarly, a federal court will follow state decisions as to how far a cause of action must be 'complete' to have 'accrued' under state limitation statutes but will look to federal law to determine what needs to be done to advance a federally created right to the level so required." Moviecolor limited v. Eastman Kodak Co., (2nd Cir.) 288 F.2d 80, 83, cert. denied 368 U.S. 821, 82 S.Ct. 39 (1961).

Whether the litigation's attack be federal or state or considered as an amendment or prior claim, it appears that the courts would hold the attack valid and hold the action timely.

This Court should resolve the conflict as to limiting the attack upon a judgment by discretionary powers and the application of state laws to the relief sought by the attack upon a federal court's judgment.

II

UNCONFORMITIES

Apart from the attack, the court held the Amendments invoked inapplicable. Yet, the racial preference was not justified. When a preference "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on the basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. Shelly v. Kraemer, 334 U.S. 1, 22; 68 S. Ct. 836, 846; 92 L.Ed 1161 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351; 59 S.Ct. 232, 237; 83 L.Ed 208 (1938)." Regents of California v Bakke, ___U.S.___, 98 S.Ct. 2733, 2753.

Moreover, the court's ruling holding NEA valid would also hold the petitioner and those teachers similarily situated, including the black preference teachers, governed by F.S. 230.22. We now know that state statute was circumvented for the black teachers (A39).

In Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, that court held that although a law may be neutral on its face, it can not be applied so as to discriminate between races. See, also, Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 106.

Then Hasting v. Bonner, (CA Fla 1978) 578 F.2d 136 should govern, since that court held that even if a teacher or other public employee does not have a contractual right to continue employment, he may not be dismissed nor be denied renewal of his contract on the basis that

infringes on his constitutional protected interest. Certainly the inequalities under Florida statues invoked the Fourteenth Amendment and 42 U.S.C. § 1983.

The court would hold § 1983 applicable, but barred, and would not hold the Amendments applicable, yet § 1983 encompasses the Amendment and is derived from and a mere duplication of the Amendment and as such would apply. See, Spears v. Mount Etna Merris, 343 F.Supp. 52, affirmed, 431 F.2d 1089 (1969); Lovelace v. Leekburg Area School Dist., 310 F.Supp. 579.

In Mc Donald v. Santa Fe Trail Transport Co., 427 U.S. 237, 96 S.Ct. 2574, that court held that white and black employees, similarily situated, are to be treated equally and that the statutes also protect the rights of white employees.

The court held that at some point in time a difference in treatment was created by the racial preference but declined to establish its origin. It appears that the difference occurred after the deadline for payment of the $100 and before the NEA litigation. Thus such difference relates to the statutes invoked in NEA, the Fourteenth Amendment and 42 U.S.C. § 1981 and § 1983. Had this racial preference been known, the legality of the preference would have been resolved and this litigation unnecessary. Mizell v. North Broward Hospital Dist., (CA Fla. 1970) 427 F.2d 468, would appear to hold the claims timely because they would be consided as prior claims.

This Court is requested to resolve the conflict as to whether the burden is precisely tailored to serve a compelling

governmental interest and is constitutionally proper and whether the Amendments are applicable.

It has been submitted that it is a clear contradiction to established law, to bar the attack upon the NEA judgments. The court held that although the effects of the alleged discrimination may persist, it is not a "continuing violation". The court ignores the fact that the inequality reoccurs upon the issuance of yearly contracts, in that, the petitioner's compensation and seniority remain lower because of his race. The court's ruling appears to conflict with the courts in Allen v. Amalgamated Transit Union Local 788, (1977) 544 F.2d 876, cert. denied 437 U.S. 891, 96 S,Ct. 226; Clark v. Olinkraft, (5th Cir. 1977) 556 F.2d 1219; Jacobs v Bd. Regents Div. Univ. Dept. Ed. State of Fla., (Fla. 1979) 473 F.Supp. 663, which held that continuing inequality of salary and seniority tolled the running of limitation.

Moreover, the court holds that all aspects of the litigation barred by a state statute of limitation respecting back pay and no event tolled the running of the statute of limitations.(A 27)

The court's ruling conflicts with the rulings of other courts. The court relied on Cutliff, supra, which relied on the Johnson, supra, an Appeals Court in another state that suggested that F.S. 95.11(7)(b) could be applied in Florida.

These courts did not determine how the state courts would classify the action had it been before state courts. The court ignored state court cases cited to assist the court in its determination. Such action conflicts with the teaching

in Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976), which held that the court should look to state court's classification and should not second guess state courts. The applicable period is derived from that which the State would apply if the action had been brought in a state court. See, Auto Workers v. Hoosier Corp., 383 U.S. 696, 86 S.Ct. 1107 (1966); Holmberg v. Armbrect, 327 U.S. 392, 66 S.Ct. 582 (1946).

In Walker v. State rel. Kirton, 13 So. 2d 443 (Fla. 1943) the court held that an action by a teacher would be one of an action upon a contract mandated by state law and is clothed with the same sanctity as other contracts. Harkless v Sweeny Independent School Dist., 427 F.2d 319,324 holds that the claim for teachers seeking reinstatement is not a claim for back pay but a claim of contract, the absolute remedy not a potential remedy.

When the court held the claims being one of back pay, it failed to employ the so called resemblance test. The court did not consider each aspect of the complaint since each aspect must be given separate statute of limitations treatment depending upon the nature of the acts complained of. Kedra v. City of Philadelphia, 454 F.Supp. 652 (1978).

The court not only held section 1981 barred but also held the nature of section 1983 and section 1985 addressing the issues barred by a state statute for back pay. The court held the claims as discrimination in employment and rejected other state statutes because they did not address discrimination. Yet the statute selected also did not address discrimination. If we follow that reasoning then

the only proper statute would be the statute for which no specific limitation period is provided, F.S. 95.11(4).

The courts below limited the remedy by applying conflicting rulings of other courts which have passed upon similar matters. Thus this case is affected more than any other by those conflicts, which this Court should resolve in order to establish a uniform approach.

The petitioner has argued that the courts applied erroneous legal principles in ascertaining that NEA, remains valid, the Amendments invoked not applicable and the nature and purpose of the statutes invoked as being one and the same.

CONCLUSION

Wherefore, the petitioner respectfully prays that a writ of certiorari be granted.

Paul A. Acquisto

APPENDIX

APPENDIX A

NATIONAL EDUCATION ASSOCIATION, et al., Plaintiff-Appellees, vs. LEE COUNTY BOARD OF PUBLIC INSTRUCTION, et al., Defendants Appellants. Case No. 41561, 260 So.2d 206 Supreme Court of Florida, March 15, 1972.

DEKLE, J.

The United States Court of Appeals for the Fifth Circuit in its cause numbered 28195 on appeal from the United States District Court, Middle District of Florida (September 16, 1971), has (in the continuing good relationship which is reflected by such certified questions on State issues) certified to us the following question of law based upon recited facts, pursuant to Fla. Stat. § 25.031 and Rule 4.61 F.A.R.:

> Under the facts as stated was the Lee County Board of Public Instruction authorized by Fla. Stat. § 230.22(5), or any other section of the Florida School Code or implementing regulation, to condition the return of resigned teachers to their status prior to a teacher work stoppage, upon payment by each teacher of $100 to the School Board?

This litigation is an aftermath of a well-publicized period of teacher "strikes" over the State of Florida in February 1968. Included in the turmoil were 400 Lee County (Ft. Myers) school teachers who participated in a state-wide teacher "work stoppage." A temporary restraining order was obtained by the School Board enjoining the teachers from striking but recognizing

their right to effect lawful resignations. The teachers thereupon submitted such resignations in writing and after a proper waiting period these were accepted by the Board. Ultimately, the teachers were advised by their state organization to return to the classrooms provided they did not suffer any reprisals or reductions in status. It was after negotiations through citizen mediators that both the teacher group and the School Board voted to accept a proposal whereby all teachers would be permitted to return to their former positions, provided that each pay the School Board $100.

U. S. District Judge Krentzman concluded that the payments were "fines" for leaving their positions and as such violated the due process clause of the 14th Amendment to the U. S. Constitution (the determination of which is of course reserved for any determination by the Court of Appeals). Judge Krentzman also held that such payment would violate state law. It is upon this proposition that the Court of Appeals makes its certification for opinion as a question of law which may be determinative of the cause and "on which there appear to be no clear, controlling precedents in the decisions of the Supreme Court of Florida," as provided in the statute.

Our review of the facts under Florida law leads us to the conclusion that the certified question should be and is answered in the affirmative, i.e., that payment of the $100 was authorized as liquidated damages under Fla. Stat. § 230.22(5).[1]

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1. "(5) PERFORM DUTIES AND EXERCISE RESPONSIBILITY.--The school board may perform those duties and exercise those re-

This was in reality an agreement between the Board and plaintiffs-teachers to do what was done. The quarrel seems to be with labels given to their actions. No good reason appears why there could not be such an agreement, inasmuch as teachers and the Board may within legal limits have agreements on employment with terms as they may fix.

The agreement was generally recognized as an acceptable solution to both sides after extensive negotiations between them in order to arrive at a solution which would end a stalemate then existing. These teachers had submitted written resignations which were accepted effective March 1, 1968 yet they desired after the difficulty at that time had subsided, to return to their former positions in continuing seniority and standing rather than as new teachers. The Board did not really object to this, apparently, but was in the position of having to follow the statute[2] and also having sustained alleged damages because of the closing of the schools and the ad-

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sponsibilities which are assigned to it by law or by regulations of the state board and, in addition thereto, those which it may find to be necessary for the improvement of the district school system in carrying out the purposes and objectives of the school code."

2. Fla. Stat. § 231.36(2), bars from employment for one year any teacher who leaves his position without first being release by the county board, and § 231.36 (3)(a)2, restricts issuance of continuing contracts to teachers performing service which is "continous except for leave duly authorized and granted." (emphasis ours)

ditional expenses due to the resignations of the teachers. The teachers' action created a dilemma: It rendered the teachers ineligible for employment with tenure after the effective date of March 1 under the Florida School Code,[3] so that there was no existing legal method by which the departed teachers could be reemployed except as new teachers (a condition clearly unacceptable to their state association). This action of the teachers also invoked the School Board's constitutional duty to recover from the teachers any monetary loss occasioned by the teacher walkout. Article XII, Sections 9 and 13, of the Constitution of 1885, then in force, forbade expenditure of school funds for any purpose other than the support and maintenance of public free schools.[4] For the School Board to have forgone collection of damages which it sustained because of the walkout would have been tantamount to subsidizing teacher lobbying and political activity.[5] It seems to us a strange and ironclad system of administration and of law which does not allow a reasonable latitude to "reopen" a gate which has of necessity been closed--yet not locked.

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3. Id.

4. See, for example, First National Bank v. Board of Public Instruction, 111 So. 521, 525 (Fla. 1927).

5. Even aside from the constitutional prohibitions set forth in Art. XII, public funds and public personnel may not be used for the advancement of a partisan political cause. McCarty v. Florida State Road Dept., 211 So.2d 226 (1st DCA Fla. 1968).

The law looks to just results and reasonable conclusions. Such a conclusion was sought by an emergency regulation adopted by the State Board of Education of Florida, providing in part:

> "During a period of emergency as defined in Section 236.0711, Florida Statutes, the state superintendent of public instruction is authorized to waive such rules and regulations as he may consider necessary. . . ."[6]

Pursuant thereto the state superintendent waived the provisions of Section 130-1.76, State Board of Education regulations,[7] the effect of which was to permit county boards to grant personal leave retroactively so that teachers participating in the walkout could return to their jobs with no loss of tenure.

This was fine as to the walkout. The Lee County teachers, however, had resigned and their resignations had been accepted, so that they were no longer employed teachers who could be granted leave, even retroactively. Their situation called for a further solution. One was found in the aforesaid agreement for the teachers return with status and a corresponding compliance with Florida constitutional requirements[8] by

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6. State Board of Education Regulation 130-0.01(3)(emergency) 2-20-68

7. Providing in part, "Leave shall be officially granted in advance, and no action purporting to grant leave retroactively shall be recognized. . . ."

8. Fla. Const. art. XII, §§ 9 & 13 (1885), then in effect.

payment to cover any damages. This took into consideration both sides of the problem in reaching a fair result which placed the school system in the State of Florida back into operation and at the same time protected the interest of teachers who manifested the same concern. In a sense, the School Board, in the exercise of its broad discretionary powers conferred by law, took about as much "Kentucky windage" in taking the teachers back with tenure as it did in letting them pay for the results of their actions.

The Board's action is supported by In Re Board of Public Instruction of Alachua County, 35 So.2d 579 (Fla. 1948). This Court also commented favorably upon such efforts of school authorities to maintain the educational program during extreme circumstances in the case of Board of Public Instruction v. State, 24 So.2d 99 (Fla. 1945), which provided for transporting students to schools in other districts temporarily because of the unavailability of competent teachers, saying:

> "We cannot resist remarking that, in the situation facing them, the course pursued by the Board of Public Instruction was entirely practical, even if technically irregular. If, as was shown by undisputed testimony, no teachers could be obtained, or at least no competent ones, it was much better that the pupils be transported to schools in other districts than that their training be allowed to suffer for the period that the condition existed. We can but wonder what better

the superintendent and the members of the Board of Public Instruction could have done. . ." (p. 103)

Harvey v. Board of Public Instruction, 101 Fla. 273, 133 So. 868 (Fla. 1931) is cited as precluding such payment and making it a violation of state law. In a situation where the Board of Public Instruction's authority is doubtful, Harvey holds that the doubt must be resolved against the Board. In effect, that decision limited the powers of the Board. Subsequently, however, a new Act, Ch. 19,355, Acts of 1939, greatly enlarged the scope of the public school programs, activities and facilities. It was designed to provide a more comprehensive public educational system for the people of Florida. In re Board of Public Instruction of Alachua County, supra, thoroughly analyzes the code's purpose. In that opinion we held, with reference to a Board of Public Instruction's authority, that 1931 Harvey did not apply due to the 1939 code and its intent to expand educational horizons. Consequently, the court in Alachua followed the spirit and purpose of the 1939 School code and refused to limit the powers of the Board where its authority was unclear. In light of the 1939 School code, subsequent legislative changes thereto and the Alachua decision, Harvey is not controlling here.

Teachers place great emphasis upon the word "fine" which was employed in the agreement. The fact that the language of the agreement used the words "that any such teacher shall forfeit a fine of $100" does not in itself control or determine the legal effect of the payment merely because it is labeled a "fine." Just because the cat has her kittens in the oven does

not make them biscuits. It is understandable that some teachers would have sensitive feelings on the subject and its effect upon their professional stature. This would warrant in their minds the view that such "fine" was entirely an act of retribution and punishment. This, however, does not make it so, particularly if there is evidence, constitutionally supported,[9] basing the payments upon a reimbursement for additional expenses incurred in a tumultuous upset of the schools and the necessary expenses to reopen. And so it is that the teachers are visited in this contention regarding the use of the term "fine", with the same condemnation employed intheir argument that the payment cannot be "liquidated damages" merely by designating it as such.

The real test in each instance is what in fact the payment <u>is</u> and whether there were in fact damages as a basis for a consensually imposed amount to be paid. The earlier recriminations and feelings were thereby resolved which are urged as constituting this really a "fine". The teachers are thereby refusing to recognize the very solution which obtained the results they desired. It is essential to a compromise, that earlier positions be mutually merged into the final result.

We consider the agreed payment here as a proper one of liquidated damages which may be shown. On such basis it is not violative of any state statute. It very happily afforded for each side precisely what they wanted. This was simply the vehicle for accomplishing it. The Court should not

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9. <u>Fla. Const.</u> art. XII, §§ 9 and 13 (1885, then in effect)

interfere with such a contract thus accomplished. The result accords with the public interest as well as with the protection of the private rights of the parties upon mutual considerations.[10]

In an era of crisis living which churns up crisis litigation, there seems to us to be no place for needless roadblocks to reasonable solutions, if we are to retain a court or jury of reasonable men. The solution provided was like opening a gate which had been closed by the resignations duly accepted by the Board, following the teachers initial departure from their classrooms "in breach of their school contracts for the year and in violation of Florida law."[11]

To hold that the School Board could not accept payment from the teachers as recompense for financial loss is to force litigation between the parties. Surely the Board, like other parties, has authority to agree upon an amount of money as liquidated damages occasioned by a breach of contract. The teachers obtained their desired tenure for the nominal $100. Mutual considerations which establish legal obligations between two or more parties form the basis of a binding contract.[12]

We hold that the substance of the ac-

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10. Kislak v. Kreedian, 95 So.2d 510 (Fla. 1957); Bacon v. Karr, 139 So.2d 166 (2d DCA Fla. 1962); and Radabaugh v. Ware, 241 So.2d 738 (4th DCA Fla. 1970).

11. Dade County Classroom Teachers Assn., Inc. v. Rubin, 217 So.2d 293 (Fla. 1968); Pinellas County Classroom Teachers Assn., Inc. v. Board of Public Instruction of Pinellas County, 214 So.2d 34 (Fla. 1968).

12. See Footnote 10.

cord did not violate the public policy or the laws of Florida. Indeed, the common sense solution urged upon the Board by public-spirited citizen mediators--and finally acceded to by the Board upon the representation that the teachers had approved it--may well have been the only avenue which would have served to reopen the schools of Lee County. This was the School Board's primary responsibility which it was required to perform.

We accordingly answer the certified question in the affirmative, that the School Board's action was correct and violated no state law of Florida.

We draw no distinction in this Court's answer and opinion on the certification, as to the two classes of teachers, whether they made payment and returned or not, for they are equally bound and have made their choice. Neither do we pursue the supplemental questions submitted by the parties regarding estoppel and waiver by the teachers upon payment being made. It seems unnecessary to comment where the law of the State of Florida, as well as the general law, is clear as to the effectiveness of a waiver in these and other circumstances upon unconditional and understood acceptance and performance.[13] We do not of course presume upon the certifying court's determination of an alleged violation of due process transcending such an estoppel

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13. United Contractors, Inc. v. United Construction Corp., 187 So.2d 695, 701 - 702 (2d DCA Fla. 1966); Board of Public Instruction of Manatee County v. Cassidy, 155 So. 834, 835 (Fla. 1934); Board of Public Instruction of Marion County v. Cannon, 92 So. 148 (Fla. 1922).

or waiver, as contended by the teachers.

The further suggested question of whether an award of damages to the teachers would violate Florida law, we answer in the affirmative upon the authority of Board of Public Instruction of Marion County v. Cannon, 92 So. 148 (Fla. 1922), and Haddock v. Board of Public Instruction for Manatee County, 139 So. 147 (Fla. 1932), holding:

> "The Constitution (article 12, § 9) provides that county school funds shall be used 'solely for the support and maintenance of public free schools.' Even if a three-year teacher's contract is contemplated by the law and such contract is illegally breached by the county board of public instruction, whereupon the teacher takes other employment at less salary, such teacher cannot recover against the county school fund the difference between the contract salary and the smaller salary earned in other employments, since that would in effect violate the constitutional command that such fund shall be used 'solely for the support and maintenance of public free schools.'"

Having thus responded we dispatch with this opinion, and with our profound respects, the entire file in the cause to the Court of Appeals for the Fifth Circuit of these United States.

ROBERTS, C.J., ADKINS and BOYD, JJ.,

Concur

ERVIN and CARLTON, JJ., Concur in Conclusion

Ervin, J., Concurring Specially:

I concur in the conclusion the certified question should be answered in the affirmative.

Carlton, J., Concurs.

* *

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

467 F.2d 447

No. 28195

NATIONAL EDUCATION ASSOCIATION, INC., ET AL.,

Plaintiffs-Appellees,

versus

LEE COUNTY BOARD OF PUBLIC INSTRUCTION, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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(August 25, 1972)

Before BROWN, Chief Judge, COLEMAN and CLARK, Circuit Judges.

BROWN, Chief Judge: Having previously certified this case to the Supreme Court of Florida for an authoritative resolution of perplexingly difficult State law issues, we can now conclude with absolute assurance that despite a commendable effort the District Court incorrectly decided them. Since we are also convinced

that the circumstances revealed by this record present no problem of Federal constitutional proportions, we reverse.

The context of the controversy has already been exhaustively considered in the District Court's opinion,[1] in our own prior opinion certifying the case,[2] and in the opinion of the Supreme Court of Florida answering our certification.[3] Generally stated, the question is whether the Board of Public Instruction of Lee County, Florida may require individual payments of $100 as a condition for the reemployment with tenure of 425 public school teachers who had voluntarily submitted simultaneous mass resignations as a result of their disagreement with the State's educational policies. Deciding that the unilateral imposition of such a requirement violated both Florida law and the due process clause of the Fourteenth Amendment, the District Court granted the teachers' motion for summary judgment, directed the repayment of $100 to those teachers who had complied with the Board's demand, and ordered the reinstatement with back pay of those teachers who had not been rehired because of their refusal to comply.

In a lengthy post-certification memorandum the teachers have strenuously argued that for a variety of reasons we should now reconsider the determination by the Supreme Court of Florida that the Board's action was authorized by State law. We unconditionally

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[1]M.D. Fla., 1969, 299 F. Supp. 834.
[2]5 Cir., 1971, 448 F.2d 451.
[3]Fla. S.Ct., 1972, 260 So.2d 206.

decline the invitation. The highly commendable objective of the Florida certification procedure, which we have frequently employed with great success in the past,[4] is to provide this Court with indisputable authority for deciding difficult and previously unresolved issues of State law, thereby minimizing or eliminating entirely the confusion, uncertainty and juridical friction inherent in a system of Federalism that frequently forces Federal Judges to assume — often with extreme reluctance — a decisional role that properly belongs to their brethren on the State bench. Adopting such a course, when it is available to us, involves neither abstention nor an abdication of our constitutionally imposed duty to decide cases properly before us for re-

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[4]Eg., Oliva v. Touchton, 5 Cir., 1971, 448 F.2d 437; Gordon v. John Deere Co., 5 Cir., 1971, 451 F.2d 234; Allen v. Estate of Carman, 5 Cir., 1971, 446 F.2d 1276; Boyd v. Bowman, 5 Cir., 1971, 443 F.2d 848; Martinez v. Rodriquez, 5 Cir., 1968, 394 F.2d 156, on certification, Fla., 1968, 215 So.2d 305, on receipt of answers to certification, 5 Cir., 1969, 410 F.2d 729, Life Ins. Co. of Va. v. Shifflet, 5 Cir., 1967, 370 F.2d 555, on certification, Fla., 1967, 201 So.2d 715, on receipt of answers to certification, 5 Cir., 1967, 380 F.2d 375 Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1966, 358 F.2d 347, on certification, Fla., 1967, 201 So.2d 743, on receipt of answers to certification, 5 Cir., 1968, 394 F.2d 656; Green v. American Tobacco Co., 5 Cir., 1962, 304 F.2d 70, on rehearing, 304 F.2d 85, on certification, Fla., 1963, 154 So.2d 169, on receipt of answers to certification, 5 Cir., 1963, 325 F.2d 673, cert. denied, 1964, 377 U. S. 943, 84 S.Ct. 1349, 12 L.Ed.2d 306, on appeal after retrial, 391 F.2d 97, rehearing en banc denied, 1969, 409 F.2d 1166; Clay v. Sun Ins. Office, Ltd., 1960, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170, on certification upon remand, Fla. 1961, 133 So.2d 735, on receipt of answers to certification, 5 Cir., 1963, 319 F.2d 505, reversed, 1964, 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed.2d 229. See W.S. Ranch Co. v. Kaiser Steel Corp., 10 Cir., 1968, 388 F.2d 257, 265 (dissenting opinion), reversed, 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835.

view.[5] It is simply a relatively expeditious way to substitute informed judgment for informed guesses, desirable because of our fundamental conviction that there is no particular virtue in deciding uncertain issues of State law quickly but incorrectly. The consistently prompt and well considered answers which our certified questions have thus far evoked merely reinforce that conviction.

In retrospect the wisdom of certification in the present case is apparent. A distinguished Florida-trained United States District Judge, following extensive consideration of the State claims in a carefully reasoned opinion, concluded that the Board's exaction of a $100-per-teacher payment as a condition of reemployment violated Florida constitutional and statutory law. The Supreme Court of Florida, having before it the briefs and entire record filed in this Court and deciding the question on the basis of precisely the facts that were before us, reached the opposite conclusion and held that "the substance of the accord did not violate the public policy or the laws of Florida." 260 So.2d at 210. That determination must necessarily be conclusive. *Erie Railroad Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.[6]

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[5]Perhaps not all commentators would agree. See Agata, *Delaney, Diversity, and Delay: Abstention or Abdication?* 4 Hou.L.Rev. 422 (1966).

[6]The gist of the teachers' argument is that the Supreme Court of Florida has misapplied the principles of Florida law to the facts of this case by formulating its decision in terms of a legal theory which those facts do not support. The obvious answer is that a Federal court does not second-guess a State's application of its own law. Nelms v. State Farm Mutual Automobile Ins. Co., 5 Cir., 1972, ____ F.2d ____ [No. 72-1276, July 6, 1972].

Of course, as we explicitly pointed out in our original opinion certifying the cause, 448 F.2d at 455, the claimed denial of Federal rights secured by the United States Constitution remains for our decision. *England v. Louisiana State Board of Medical Examiners*, 1964, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440. We agree with the District Court that those teachers who accepted reemployment neither waived nor were thereafter estopped from asserting their right to contest the legality of the disputed payments. Cf. *Bumper v. North Carolina*, 1968, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797. But we do not agree that the Board's imposition of the $100 condition violated the teachers' Federal constitutional rights.

Essentially the teachers' theory is that the forced exaction of a $100 payment from each of them in exchange for their returning to work with their pre-resignation status intact amounted to a fine or penalty for a legislatively undefined wrong, violative of their right to procedural due process because they were afforded no hearing or other opportunity to protest the payments or to contest their legality. Phrased another way, the argument is that the teachers were "punished" for their prior concerted efforts to effect changes in State school policies and that such "punishment," in the absence of traditional procedural safeguards, could not be made a condition for reemployment because it compelled the surrender of Fourteenth Amendment rights in return for a job in the Lee County school system.[7]

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[7]Throughout these proceedings the parties have waged a continuing and for the most part futile dispute over the appropri-

Concededly it is now established to a point beyond all dispute that "public employment, including academic employment, may [not] be conditioned upon the surrender of constitutional rights which could not be abridged by direct governmental action." *Keyishian v. Board of Regents*, 1967, 385 U.S. 589, 605, 87 S.Ct. 675, ____, 17 L.Ed.2d 629, 642.[8] Denial of a government job solely because an individual refuses to abjure the protection afforded by the United States Constitution amounts to nothing more than an attempt to accomplish indirectly an otherwise impermissible objective — penalization of conduct which is constitutionally insulated against punishment. *Speiser v. Randall*, 1958, 357 U.S. 513, 526, 78 S.Ct. 1332, ____, 2 L.Ed.2d 1460, 1473. Consequently, this Court has encountered no difficulty in holding that a Federal claim based upon the allegation that a State has denied public

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ate characterization of the $100 payments. We find the disagreement inconclusive and irrelevant. Whether the payments are denominated as "fines," "liquidated damages," "contractual consideration," or "conditions for reemployment" has no bearing on the question of whether such payments — regardless of the verbal label attached to them — may be imposed as an involuntary condition of employment on the facts of this case. Cf. Graham v. Richardson, 1971, 403 U.S. 365, 374, 91 S.Ct. 1848 ____, 29 L.Ed.2d 534, 543, repeating the Supreme Court's consistent rejection of "the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'."

[8] See also Pickering v. Board of Education, 1968, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811; Cramp v. Board of Public Instruction, 1961, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285; Baggett v. Bullitt, 1964, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; Wieman v. Updegraff, 1952, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216; Truax v. Raich, 1915, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131.

employment solely because of the exercise of a constitutional right will, if proven, entitle the plaintiff to appropriate relief. *Sindermann v. Perry*, 5 Cir., 1970, 430 F.2d 939, *affirmed*, 1972, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ [40 U.S.L.W. 5087, June 27, 1972]; *Ferguson v. Thomas*, 5 Cir., 1970, 430 F.2d 852; *Pred v. Board of Public Instruction*, 5 Cir., 1969, 415 F.2d 851.

However, none of these cases have any application here unless the teachers were in fact compelled to forego the exercise of a Federal constitutional right in return for reemployment. The critical flaw in their argument is the uncritical (and, on this record, insupportable) assumption that the $100 payments constituted a *deprivation* of property without due process of law within the prohibition of the Fourteenth Amendment. The agreement clearly provided that the teachers would receive a benefit to which concededly they were not otherwise entitled — reemployment with full tenure rights and other accompanying privileges which they had enjoyed before their resignations — in return for a payment of $100. In substance, they were offered an opportunity to surrender one "property right" in order to acquire another "property right" that was plainly of greater value to them.* Such a mutually

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*The District Court found it unnecessary to consider this question because of its determination that the payments were illegal under Florida law in any event. 299 F. Supp. at 840, n. 10.

Technically the issue of the comparative value of the $100 payments and the tenure rights which they secured is a factual one that was never stipulated or resolved on motion for summary judgment. However, we have no hesitation in concluding that the fact is not and obviously could not be

advantageous exchange cannot be characterized as a *deprivation* of property, regardless of whether the teachers' payments are pejoratively denominated as "fines" and regardless of whether the subjective intention of the Board members who voted for it was to "punish" alleged past misconduct.

We do not dispute the District Court's conclusion that the payments were not "voluntary" in any meaningfull sense.[10] For that matter *all* exchanges of contractual consideration are "involuntary" to the extent that the contracting parties would much prefer to secure the benefits of the agreement without bearing the inevitable burdens. Likewise we may concede that the teachers here were involuntarily subjected to choosing between paying consideration for an employment benefit of at least equivalent value and foregoing employment altogether. The choice between these options was admittedly coerced. But regardless of whether it was accepted or rejected the Board's offer did not entail a deprivation of property. Accordingly, the payment of the $100 could not have involved the surrender of the right to protection of that property guaranteed by the due process clause of the Fourteenth Amendment.

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genuinely disputed. An earlier proposal under which the teachers would return to their jobs as "new teachers" (i.e. without tenure) was rejected by them as wholly unacceptable. 448 F.2d at 454. Pursuant to the agreement that was ultimately adopted approximately 400 teachers paid the $100. Thus there can be no possible doubt that the tenure rights were worth at least $100 to the teachers.

[10] "The teachers obviously would have accepted a proposal which would have allowed them to return at their old status but without paying the fine. No one in his right mind insists upon paying a $100 fine when he may choose not to pay it without suffering any other disability." 299 F. Supp. at 841.

Obviously the teachers would be in an entirely different position if they were somehow able to establish that they were legally entitled to tenure without payment of $100 and were therefore unilaterally deprived of that money without due process. Instead they are forced to concede that they had effectively resigned their positions and that the Board was not even legally obligated to rehire them at all. In such circumstances their claim fares no better than that of a teacher who, having neither *de facto* tenure nor an objective expectancy of reemployment, is discharged for unspecified reasons without notice or a hearing. *Board of Regents v. Roth*, 1972, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ [40 U.S.L.W. 5079, June 27, 1972]; *Sindermann v. Perry, supra; Skidmore v. Shamrock Independent School District*, 5 Cir., 1972, ___ F.2d ___ [No. 71-2841, July 27, 1972]. Absent the invasion of some protected Fourteenth Amendment right, neither notice nor hearing is required.

The same result obtains if approached outside of a concept of "exchange" of valuable rights. The key to decision, of course, is whether the teachers were forced to give up a constitutional right. Under Florida law they had no right to reemployment, either with or without tenure. Indeed, they had no right to reemployment with tenure. The loss of this right was not due to an exercise of First Amendment rights. It was the result of the purposeful resignations — a right which the earlier state court injunction expressly recognized was theirs. The school authorities did not accede to the demands of the teachers, but it did not prior to the resignations or thereafter deny them any federal

constitutional right or impede in any way the unrestricted assertion of them. The teachers sought reemployment and a return to the status of former tenure privileges, a status lost by the resignations. The Florida Supreme Court's obligatory ruling accords to the requirement of a $100 payment the exercise of reasonable judgment on the part of the school authorities and in its exercise we find no element of a denial of a federal right.

The judgment of the District Court is reversed and the cause remanded for entry of judgment in favor of the Lee County Board of Public Instruction.

REVERSED and REMANDED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

PAUL A. ACQUISTO, Plaintiff, vs. LEE COUNTY BOARD OF PUBLIC INSTRUCTION (SCHOOL BOARD OF LEE COUNTY), et al., Defendants. Case No. 77-48 Civ. Ft.M-K In the United States District Court for the Middle District, Fort Myers Division July 23, 1979.

ORDER

The Court has before it plaintiff's motions for summary judgment and for appointment of counsel and defendants' motion to dismiss.

PLAINTIFF'S CLAIMS

Plaintiff is seeking restoration of back pay, benefits, and seniority, actual and punitive damages and injunctive relief. Plaintiff is a white person who was employed as a teacher by defendant Board of Public Instruction in February 1968. At that time, he and many other teachers took part in a work stoppage. The teachers were enjoined from striking. They then voluntarily submitted simultaneous mass resignations. The United States Court of Appeals for the Fifth Circuit held, in National Education Association v. Lee County Board of Public Instruction, 467 F.2d 447 (1972), that the Board could constitutionally require payment of $100 by each teacher who had resigned as a precondition to that teacher's re-employment with uninterrupted tenure and other privileges.

Plaintiff refused to pay the $100. Plaintiff alleges that the Board did not rehire plaintiff until on or about August 24, 1970. He alleges that he learned, on or about January 1, 1974, that although five black teachers had paid the $100

payments with checks which were not honored (so that no actual payment was received), these teachers were retained or reinstated without loss of seniority.

Plaintiff alleges jurisdiction in this Court under "the provisions of the Civil Rights Acts, and 42 USCA sections 1981, 1983, 1985, 1986; 18 USCA sections 241, 242, 245, 1001; 28 USCA sections 1331, 1343, 1355; and the Fifth and Fourteenth Amendments to the United States Constitution."

PLAINTIFF'S MOTIONS

Defendants' affidavit in opposition to the motion for summary judgment indicates the existence of genuine issues of material fact. The existence of other such issues is indicated by defendants' motion to dismiss and memorandum in support. Plaintiff's motion for summary judgment is DENIED. Rule 56(c), Fed.R.Civ.P.

Plaintiff's motion for appointment of counsel is DENIED. Although 28 U.S.C. § 1915 grants general authority for the appointment of counsel, as a matter of discretion, in purely private, civil litigation, there is no express provision for the payment of fees or reimbursement of costs, as there is in the case of criminal prosecutions and habeas corpus proceedings. Moss v. Thomas, 299 F.2d 729 (6th Cir. 1962). The number of lawyers willing to accept appointment on a pro bono publico basis is limited. As a consequence, the Court is unable to honor all the requests made for the appointment of counsel.

MOTION TO DISMISS

18 U.S.C. §§ 241, 242, 245, and 1001

are criminal statutes, none of which will support a civil suit by a private party. See, §241 at note 57, §242 at note 37, and cases cited thereunder.

28 U.S.C. §§ 1331, 1343, and 1355 are jurisdictional statutes, which give the district courts jurisdiction of causes of action authorized elsewhere. None of these sections sets out a cause of action by itself.

Ground I of defendants' motion to dismiss contends that they were exempt from the requirements of Title VII of the Civil Rights Act of 1964, at the time of the alleged discrimination. State and local government employees were not brought under the coverage of Title VII until the 1972 amendments. Pub.L. 92-261, 1972 U.S.Code Cong. and Adm.News, pp.2152-54. The 1972 amendments do not apply retroactively; state and local government employees are covered only as of March 24, 1972, the effective date of the amendments. Jones v. City of San Antonio, 568 F.2d 1224 (5 th Cir. 1978). Plaintiff has failed to state a cause of action under Civil Rights Acts. (Plaintiff's reply to the motion to dismiss does not contest the arguments made in Ground I of the motion to dismiss.)

Ground III of the motion to dismiss contends that plaintiff's claims under 42 U.S.C. §§1981, 1983, 1985, and 1986 are all barred by the applicable statutes of limitations. §1986 contains a one year period of limitation. Where there are no specifically stated or otherwise relevant federal statutes of limitation, the controlling periods are the most appropriate ones provided by state law. Johnson v. Railway Express Agency, Inc., 95 S.Ct. 1716, 1721 (1975) (§1981); Shaw v. Mc-

Corkle, 537 F.2d 1289 (5th Cir. 1976) (§1983 & §1985).

Defendants argue that the proper period is provided by Fla. Stat. §95.11 (7)(b);

> . . . Actions other than those for the recovery of real property can only be commenced as follows: * * *
> (7) WITHIN ONE YEAR.---
> (b) Suits for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime.

As of January 1, 1975, this statute was replaced by Fla. Stat. §95.11(4)(c), which provides a two year statute of limitation. The change is not material to the Court's ruling on this motion.

Plaintiff contends that the proper period is provided by Fla. Stat. §95.11 (1) (1967):

> ... Actions other than those for the recovery of real property can only be commenced as follows:
> (1) WITHIN TWENTY YEARS.---An action upon a judgment or decree of a court of record in the state, and an action upon any contract, obligation, or liability founded upon an instrument of writing under seal.

Plaintiff contends that state law requires that teachers be hired by contract given under seal, so that §95.11(1) applies. What he overlooks is that this suit is not an action upon contract, but rather an action for discrimination in employment. No breach of contract is alleged. In such cases, §95.11(7)(b) (or its successor) applies. Cutliff v. Greyhound Lines, Inc., 558 F.2d 803 (5th Cir. 1977); Johnson v. Goodyear Tire &

Rubber Co., 491 F.2d 1364 (5th Cir. 1974).

The Supreme Court of the United States has held, in Johnson v. Railway Express, supra at 1723, that the filing of an EEOC complaint does not toll the statute of limitations for §1981 action relating to the same allegations. Based upon the reasoning in that opinion, this Court must hold that the filing of an EEOC complaint does not toll statutes of limitation for purpose of §1983, §1985, or §1986.

Although the effects of the alleged discrimination may persist, it is not a "continuing violation." The violation, if it occurred, accrued on or before the date plaintiff learned the black teachers were retained despite their failure to make the $100 payments. Cutliffe, supra at n.5.

Plaintiff's claims accrued no later than early January, 1974. No event tolled the running of the statute of limitation. This suit was filed August 26, 1977. The periods of limitation having run before suit was filed, plaintiff's claims under 42 U.S.C. §§1981, 1983, § 1985, and §1986 are barred by the passage of time. Relief may not be granted upon any of them.

Although plaintiff mentions the Fifth and Fourteenth Amendments to the United States Constitution, none of his pleadings suggest any cause of action arising under then, other than those dealt with above.

Plaintiff having failed to state a claim upon which relief can be granted, defendants' motion to dismiss should be and it is GRANTED.

IT IS SO ORDERED at Tampa, Florida

this 23 day of July, 1979.

s/ Ben Krentzman
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

* *

PAUL A. ACQUISTO, Plaintiff-Appellant, vs. LEE COUNTY BOARD OF PUBLIC INSTRUCTION (SCHOOL BOARD OF LEE COUNTY), et al., Defendants-Appellees. Case No. 79-3683, in the United States Court of Appeals for the Fifth Circuit, December 3, 1980.

Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1/]

1/ See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970).

* * * * *

APPENDIX B

28 U.S.C.A. RULES OF CIVIL PROCEDURE
RULE 60(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. ...
(6)... This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by independent action.

* *

AMENDMENT 5, CONSTITUTION OF THE UNITED STATES OF AMERICA

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just

compensation.

* *

AMENDMENT 14, CONSTITUTION OF THE UNITED STATES OF AMERICA
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* *

42 U.S.C.A. Section 1981
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses. and exactions of every kind, and to no other.

* *

42 U.S.C.A. Section 1983
Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any ci-

tizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* *

42 U.S.C.A. Section 1985 (2)(3)
Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of person, or class of persons, to the equal protection of

the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators.

FLORIDA STATUTE CHAPTER 95 LIMITATION OF ACTION; ADVERSE POSSESSION (1967)[1]

95.11 Limitation upon actions other than real actions.-- Actions other than those for the recovery of real property can only be commenced as follows:

(1) WITHIN TWENTY YEARS.--An action upon a judgment or decree of a court of record in the state, and an action upon any contract, obligation, or liability founded upon an instrument of writing under seal.

(2) WITHIN SEVEN YEARS.--An action upon a judgment or decree of a court of the United States, or of any state or territory within the United States or of any foreign country.

(3) WITHIN FIVE YEARS.--An action upon any contract, obligation or liability founded upon an instrument of writing not under seal.

(4) WITHIN FOUR YEARS.-- Any action for relief not specifically provided for in this chapter.

(7) WITHIN ONE YEAR.--

(b) Suits for the recovery of wages, overtime, or damages and penalties accruing under laws respecting the payment of wages and overtime.

---

1. Revised 1975

(1) WITHIN TWENTY YEARS.--An action on a judgment or decree of a court of record in this state.

(2) WITHIN FIVE YEARS.--

(a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States or a foreign country.

(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument.
(c) An action to foreclose a mortgage.
(3) WITHIN FOUR YEARS.--
(p) Any action not specifically provided for in these statutes.
(4) WITHIN TWO YEARS.--
(c) An action to recover wages or overtime or damages or penalties concerning payment of wages and overtime.

* *

FLORIDA STATUTE CHAPTER 230
230.22(5) PERFORM DUTIES AND EXERCISE RESPONSIBILITY.-- The school board may perform those duties and exercise those responsibilities which are assigned to it by law or by regulations of the state board and, in addition thereto, those which it may find to be necessary for the improvement of the district school system in carrying out the purpose and objectives of the School Code.

* *

FLORIDA STATUTE CHAPTER 231
231.36 CONTRACTS WITH INSTRUCTIONAL STAFF.--*(1) Each person employed as a member of the instructional staff in any county school system or as supervisor or principal shall be properly certificated and shall be entitled to and shall receive a written contract as specified in chapter 230;
*(2) Any person so employed on the basis of a written offer of a specific position by a duly authorized agent of the county board for a stated term of

service at a specified salary and who accepted such offer by telegram or letter or by signing the regular contract form who shall violate the terms of such contract or agreement by leaving his position without first being released from his contract or agreement by the county board of the county in which he is employed, shall be ineligible for employment in the school system of the state or any county therein for the period of one year from the date of such violation. The school board shall take official action on such violation and furnish a copy of the proceedings to the certification section of the state department of education, whereupon the certificate of the violator shall be considered as invalid for the period of one year from the date of violation.

*(3)(a) The county board of each county shall provide continuing contracts as prescribed herein. Each member of the instructional staff in each county school system, except in counties operating under local, special or general tenure laws with stated population application, who:

1. Holds a regular certificate based at least on graduation from a standard four-year college or as otherwise provided by law;

2. Has completed three years of service in the same county of the state during a period not in excess of five successive years, such service being continuous except for leave duly authorized and granted, who

3. Has been reappointed for the fourth year; and

4. Has been recommended by the county superintendent for such continuing con-

tract based on successful performance of duties and demonstration of professional competence
shall be entitled to and shall be issued a continuing contract in such form as may be prescribed by regulations of the state board.

* *

APPENDIX C
REFERENCES TO FEDERAL QUESTION

Excerpts from the Brief of Appellants-Defendants in National Education Association, Inc. (NEA), et al., Plaintiffs-Appellees, vs. Lee County Board of Public Instruction, et al., Defendants-Appellants. Case No. 28195, United States Court of Appeals for the Fifth Circuit. Reported at 467 F.2d 447.

Page 9. "To hold, as did the lower court, that the School Board could not accept any payment from the teachers as recompense for financial loss is to force litigation between the parties. Certainly the School Board has authority to agree upon an amount of money as liquidated damages occasioned by a breach of contract.[3]" Footnote 3. "F.S. 230.22 (5), reproduced in the addendum, contains a broad grant of general authority to local school boards."

Page 12. "Thus, the record below disclosed that the teachers had two routes available for returning to the classrooms, either by paying the $100 and going back at former status or paying nothing and returning on annual contract. This evidence, if accepted as true at a trial upon the merits, would take the constitutional issue raised by the teachers right out of the case. Certainly an election by a teacher to obtain employment on one basis instead of another does no violence to constitutional principles. While it is true that the teachers wanted their tenure restored, it is also true that they were not legally entitled to it, having voluntarily resigned and having created a break in their contract status. F.S.

231.36."

Page 15. "Absent agreement, the teachers were free not to return to work and the Board was free not to employ the teachers.

The Board accepted the proposal in its entirety. By this accord the teachers received the benefit of re-employment with no loss of tenure[4] and the Board received the benefit of the $100 payments from those teachers who elected that route of returning to their positions.

At the March 27, 1969, hearing before the lower court counsel for the School Board repeatedly urged the Board's contention that the agreement was indivisible (Tr. 55, 88) and that selected portions of the re-employment arrangement could not be upheld without upholding all."

Page 16. "So the record is clear and uncontradicted that the teachers were not eligible for employment with tenure after March 1, 1968, under the provisions of the Florida School Code.

Because of the apparent inequity in ordering the School Board to refund the $100 payments while permitting the teachers to keep their restored tenure, the Board filed a post-judgment motion (A 99-100) for amendment of findings and judgment, asking the lower court to clarify whether its judgment had passed upon the issue of tenure.

****

Amended Complaint Ordered Filed (R 49) Feb. 21, 1979, Filed Oct. 11, 1978 (R28) Paragraph No. 11

"There exists two separate agreements and two distinct (seal) contracts for those who did not pay the fine, one for those black teachers and another for the white Plaintiff. Not a black teacher was terminated for not paying the fine, only white.

The Defendants concealed their act of "preference" from their public records and apparently from the courts when they sought their appeal. See, National Education Association v. Lee County Board of Public Instruction, 448 F.2d 451 (1971), 260 So.2d 206 (1972), 467 F.2d 447 (1972).

This Court should note that with such overt acts and under color of the law, the Defendants circumvented the laws which they alleged mandated that the fine was necessary and absolute requirement for employment."

****

Defendants' Affidavit In Opposition (R151)

BEFORE ME, the undersigned authority duly authorized to administer oaths and take acknowledgments, personally appeared JAMES W. BUCKLEY, who, after being duly sworn, deposes and says:

1. My name is JAMES W. BUCKLEY. I am presently Director of Budget for The School Board of Lee County, Florida. I was formerly the Finance Officer for The School Board and worked for the School Board in the Finance Department.

2. I personally know that five black teachers gave the School Board checks to pay their teacher "fines" and that the checks were returned to us for insufficient funds.

3. The Superintendent directed the finance office to undertake reasonable collection efforts. These fines were not collected, and it was determined by the adminstration to drop collection efforts and close the case. The decision was made based on administrative feasibility and had nothing whatsoever to do with the race of the teachers involved.

FURTHER AFFIANT SAYS NOT.

/s/ James W. Buckley
JAMES W. BUCKLEY

SWORN TO AND SUBSCRIBED before me this 6th day of July, 1979.

/s/ (Illegible)
Notary Public

My Commission expires July 17, 1979.

****

Plaintiff's Exhibit #15 (R221)
Letter dated April 18, 1969

Mr. Ike Swain, Finance Officer
Lee County Board of Public Instruction
Fort Myers, Florida

Dear Mr. Swain:

According to the Cypress Lake payroll report of March-April, 1968, the termination date of Paul Acquisto was April 2. He was on duty 13 days during this pay period.

Sincerely,
/s/ J. Edward Taylor
J. Edward Taylor
Assistant Principal

****

APPENDIX D

In The United States Court Of Appeals For The Fifth Circuit, Case No. 79-3683
Paul A. Acquisto, Plaintiff-Appellant, vs Lee County Board of Public Instruction (School Board of Lee County), et al., Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida.

ON PETITITION FOR REHEARING (January 8, 1981)
Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ Robert B. Vance
United States Circuit Judge